DP VIJANDRAN

v.

PP

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
HAIDAR MOHD NOOR JCA
[CRIMINAL APPEAL NO: A-09-65-96]
26 JANUARY 1999
[1999] CLJ JT(2)

CRIMINAL LAW: *Penal Code - Section 193 - Fabricating false evidence - Ingredients - Whether must show that statement was necessarily false and that accused knew it to be so - Falsity of statement not proved by prosecution - Whether fatal - Whether conviction improper*

The appellant had instituted a suit in the High Court at Ipoh, and had filed therein a supporting affidavit stating that the defendant in the suit had secretly video taped him in embarassing situations, and had spliced in video images from pornographic tapes to create a composite image, thereby projecting him as a person who had acted in pornographic tapes. The appellant, by the said affidavit, was accused of 'fabricating false evidence' under s. 193 Penal Code, and was charged with an offence under that section. In the Sessions Court, the prosecution sought to prove its case *inter alia* by producing a video tape which depicted the appellant committing acts of sexual intercourse with a female partner ('Exhibit P12'). The court, upon examining Exhibit P12, made a finding of fact that the male actor who appeared therein was indeed the appellant, and on that score, called for the appellant's defence. The court then heard the testimony of the appellant's solicitor, but ruled subsequently that his evidence was uncreditworthy. The court, in the circumstances, convicted the appellant as charged, and sentenced him to a month's imprisonment and a fine of RM2,000. The appellant appealed against his conviction and sentence, and upon the dismissal of the appeal by the High Court, appealed further to the Court of Appeal.

Held:
Per Gopal Sri Ram JCA

[1] The particular finding of fact by the Sessions Court that the appellant was the actor in Exhibit P12 was amply justified by the evidence. This court, therefore, would not accede to so much of the appeal as was directed against that finding by the Sessions Court.

[2] Under s. 193, it is incumbent on the prosecution to show that the statement was necessarily false, and that the accused knew it to be so. In the event, it was incumbent for the prosecution herein to prove beyond reasonable doubt either (a) that Exhibit P12 was the very tape which the appellant spoke of in the affidavit or (b) that the only tape in existence was Exhibit P12, so that the appellant could not possibly be referring to any other tape. Neither was established by the prosecution. It followed that there was no proof of the falsity of the appellant's statement in question.

[3] Consequently, whilst it was true that the appellant had affirmed that he had 'been made out to as a person who has acted in pornographic tapes', and that it was also established beyond reasonable doubt that the male actor in Exhibit P12 was the appellant, there was no cogent link between the said declaration of the appellant and Exhibit P12. On the facts, the prosecution had just failed to establish beyond a reasonable doubt that the appellant was referring to Exhibit P12 in the material paragraphs in his affidavit which formed the basis of the charge. That being so, the defence ought not to have been called, and the Sessions Court, at the close of the prosecution case, ought to have held that the prosecution had not proved the charges.

[4] There were no grounds for the impeachment of the appellant's solicitor. The Sessions Court was clearly wrong in holding that the solicitor was a witness without credit, especially in the light of the recording officer's admission of a possibility of confusion on that portion of the previous statement contended by the prosecution as amounting to a material contradiction. The impeachment proceedings ought not to have been permitted in the circumstances of the present case.

[Appeal allowed. Conviction quashed and sentence set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah memfailkan satu tindakan di Mahkamah Tinggi Ipoh, dan telah juga mefailkan satu afidavit penyokong di mana ia menyatakan bahawa defendan di dalam tindakan itu telah secara sulit memita-vidoekan beliau dalam keadaan yang memalukan, dan telah membuat tindanan gambar-gambar video dari pita-pita lucah dengan cara yang menonjolkan suatu imej komposit, yang dengan itu telah memberi gambaran bahawa beliau adalah seorang yang berlakon dalam pita-pita lucah. Dengan mengikrarkan afidavitnya sedemikian, perayu dikatakan telah 'mereka keterangan palsu' di bawah s. 193 Kanun Keseksaan, dan beliau kemudiannya dituduh dengan satu kesalahan di bawah seksyen tersebut. Di Mahkamah Sesyen, pihak pendakwaan cuba membuktikan kesnya, antara lain, dengan mengemukakan satu pita video yang menunjukkan perayu sedang melakukan hubungan seksual dengan seorang perempuan ('Eksibit P12'). Berikutan itu, Mahkamah Sesyen membuat dapatan fakta bahawa pelakon lelaki dalam Eksibit P12 adalah perayu sendiri, dan atas alasan itu, memanggil perayu untuk membela diri. Mahkamah selepas itu mendengar keterangan peguamcara perayu, tetapi memutuskan bahawa keterangannya itu tidak boleh dipercayai. Mahkamah, dengan hal yang demikian, mensabitkan perayu seperti tuduhan, dan menjatuhkan hukuman sebulan penjara dan denda RM2,000. Perayu merayu terhadap sabitan dan hukuman, dan ekoran penolakan rayuan tersebut oleh Mahkamah Tinggi, merayu seterusnya kepada Mahkamah Rayuan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Dapatan fakta khusus oleh Mahkamah Sesyen bahawa perayu adalah pelakon dalam Eksibit P12 adalah dapatan yang disokong sepenuhnya oleh keterangan. Mahkamah ini, dengan itu, tidak akan melayan bahagian-bahagian rayuan ini yang ditujukan kepada dapatan Mahkamah Sesyen berkenaan.

[2] Di bawah s. 193, menjadi tanggungan pendakwaan untuk membuktikan bahawa kenyataan ('statement') yang berkenaan itu adalah sebenarnya palsu, dan kepalsuan itu diketahui oleh tertuduh. Berikutan itu, dalam kes semasa, menjadi tanggungjawab pendakwaan untuk membukti melampaui keraguan munasabah samada (a) Eksibit P12 adalah sebenarnya pita yang dimaksudkan oleh perayu dalam afidavitnya; atau (b) pita yang ada hanyalah Eksibit P12, yang bermakna perayu tidak berkemungkinan merujuk kepada mana-mana pita lain. Keterangan menunjukkan bahawa pendakwaan gagal membuktikan mana-mana satu

pun dari keperluan-keperluan ini. Ianya mengikut bahawa tidak ada bukti 'pemalsuan' yang menjadi intisari penting dalam kesalahan di bawah s. 193 Kanun Keseksaan.

[3] Dengan yang demikian, sementara ianya benar bahawa perayu telah berikrar bahawa beliau 'telah digambarkan sebagai orang yang berlakon dalam pita-pita lucah', dan bahawa ianya juga telah dibuktikan di luar keraguan munasabah bahawa pelakon lelaki di dalam Eksibit P12 ialah perayu sendiri, tidak terdapat pertalian yang jelas di antara ikrar perayu itu dengan Eksibit P12. Di atas fakta, pendakwaan jelas gagal membuktikan di luar keraguan munasabah bahawa perayu merujuk kepada Eksibit P12 dalam perenggan material dalam afidavitnya yang menjadi asas kepada pertuduhan. Oleh hal yang demikian, pembelaan tidak seharusnya dipanggil, dan Mahkamah Sesyen, di akhir kes pendakwaan, seharusnya merumuskan bahawa pertuduhan gagal dibuktikan oleh pendakwaan.

[4] Berdasarkan keterangan, tidak terdapat alasan bagi pencabaran keterangan peguamcara perayu. Mahkamah Sesyen jelas silap bilamana ia memutuskan bahawa peguamcara tersebut adalah seorang saksi yang tidak boleh dipercayai terutama apabila diambilkira keterangan pegawai perakam bahawa terdapat kekeliruan berhubung bahagian pernyataan terdahulu yang dikatakan oleh pendakwaan sebagai membangkitkan percanggahan material itu.

[Rayuan dibenarkan. Sabitan dan hukuman diketepikan.]

Cases referred to:
Muthusamy v. PP [1948] MLJ 57 ***(cit)***
PP v. Kasmin Soeb [1974] 1 MLJ 230 ***(cit)***
Syed Abu Bakar Ahmad v. PP [1984] 1 CLJ 80 ***(cit)***
Tai Chai Keh v. PP [1948-49] MLJ (Supp) 105 ***(cit)***
Tara Singh v. PP [1949] MLJ 88 ***(cit)***
Tengku Mahmood v. PP [1974] 1 MLJ 110 ***(cit)***
The 'Eurymedon' [1942] 73 Llyod LR 217 ***(cit)***

Legislation referred to:
Penal Code, ss. 193, 199

Other source referred to:
Indian Penal Code, Sir Hari Singh Gour, 10th edn, vol 2, p 1651

For the appellant - Muhammad Shafee Abdullah; M/s Shafee & Co
For the respondent - Shamsul Sulaiman DPP

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

The appellant was convicted by the Sessions Court at Ipoh of an offence under s. 193 of the Penal Code and sentenced to a term of imprisonment of one month and a fine of RM2,000, or in default a term of imprisonment of two weeks. His appeal to the High Court against conviction and sentence was dismissed. He then appealed to this court. At the conclusion of arguments we allowed the appeal. The reasons for our decision now follow.

The prosecution's case against the appellant is that he fabricated false evidence, the sting of the charge being that he affirmed an affidavit that contained false statements which was filed in a suit he instituted in the Ipoh High Court. The portions complained of read as follows:

> During the period the defendant by the use of a hidden video camera secretly videotaped me in embarrassing situations without my knowledge and has spliced in video images from pornographic tapes to create a composite image.
>
> By the said publication I have been made out to as a person who has acted in pornographic tapes.

It may, for completeness be mentioned here that an alternative charge under s. 199 of the Penal Code was also preferred against the appellant. At the close of the whole case, the Sessions Court found both the principal and alternative charges proved. It then convicted the appellant upon the principal charge.

In support of its case against the appellant the prosecution produced in evidence a video tape (Exhibit P12) which depicted the appellant committing acts of sexual intercourse with a female partner. Evidence, including that of an expert, was led by the prosecution to show that the images of the male appearing in Exhibit P12 were indeed that of the appellant. The Sessions Court found as a fact that the male actor in Exhibit P12 was the appellant. That conclusion was arrived at after a careful analysis of the material placed before it. Being clearly a finding of fact based upon irrefragable evidence, it was affirmed by the High Court on appeal. It is the settled practice of this court not to interfere with concurrent findings of fact save in very rare cases. If, for instance, it could be shown that the course of events affirmed by the trial judge could not have occurred, that would be a good reason for reversing his view. See, *The 'Eurymedon'* [1942] 73 Lloyd LR 217; *Tara Singh v. Public Prosecutor* [1949] MLJ 88; *Tengku Mahmood v. Public Prosecutor* [1974]

1 MLJ 110. So too may appellate interference be warranted where the trial judge has failed to critically assess and analyse the prosecution's evidence. See, *Syed Abu Bakar bin Ahmad v. Public Prosecutor* [1984] 1 CLJ 80; [1984] 2 MLJ 19.

However, the present instance is not one which falls into any of the recognised categories of cases where this court may interfere with concurrent findings of fact. We are therefore not disposed to accede to so much of the appeal as is directed against the finding by the Sessions Court that the appellant is the actor in Exhibit P12. Indeed we are satisfied that the particular finding of fact by the Sessions Court was amply justified by the evidence.

Although a number of other grounds were advanced before the High Court and re-ventilated before us, we find it sufficient to dispose of this appeal upon a point that forms the fulcrum of the case against the appellant but which does not appear to have been sufficiently appreciated by the courts below. Although we choose not to deal with the other arguments, we are not to be taken as affirming the views expressed upon these by the courts below.

It is true that the appellant stated on oath that he had "been made out to as a person who has acted in pornographic tapes". It is equally true that the prosecution had established beyond a reasonable doubt that the male actor appearing in Exhibit P12 is indeed the appellant. But what appears to have been missed is the absence of any cogent link between the declaration made by the appellant and Exhibit P12. In other words, the prosecution failed entirely to establish beyond a reasonable doubt that the appellant was referring to Exhibit P12 in the material paragraphs of his affidavit which formed the basis of the charge. He may well have been. But it is an equally reasonable inference that he was referring to some video tape other than Exhibit P12. And the latter inference is supported by evidence adduced in the course of the prosecution's case. It is axiomatic that in a criminal case where two inferences may reasonably be drawn from the same set of facts, the inference most favourable to the accused should be adopted. See, *Tai Chai Keh v. Public Prosecutor* [1948-49] MLJ (Supp) 105, at p. 108; *Public Prosecutor v. Kasmin bin Soeb* [1974] 1 MLJ 230.

The 10th edition of Sir Hari Singh Gour's work on the *Indian Penal Code* at p. 1651 of vol. 2, contains the following commentary on s. 193 which we accept as a correct statement of the law:

> It is incumbent on the prosecution to show that the statement made by the accused was false. It must prove that it is not probably but necessarily false and that he knew it to be so. A statement might be inaccurate ambiguous dubious or uncertain. But it is not on that account necessarily false. The fact that the statement as suggested a wrong inference may suffice to make it false, but it cannot then be held to be intentionally false.

Accordingly, on the facts of the present case it was incumbent for the prosecution to prove beyond a reasonable doubt either:

(1) that Exhibit P12 was the very tape which the appellant spoke of in his affidavit; or

(2) that the only tape in existence is Exhibit P12, so that the appellant could not possibly be referring to any other tape.

Neither was established in accordance with the standard required by adjectival criminal law. There was, therefore, no proof of falsity which is an essential ingredient of an offence under s. 193 of the Penal Code.

Accordingly, the Sessions Court should have held that the prosecution had not proved the charges at the close of its case. The defence ought not therefore to have been called.

There is one other matter of importance to which we must make reference. When the appellant was called upon to make his defence, he called his solicitor, Encik M.S. Murthi to give evidence on his behalf. During the course of his evidence under cross examination, the prosecution successfully applied to impeach the credit of this witness by reference to alleged contradictions between his evidence in court and the previous statement he had made to the police in the course of their investigations. Having carefully scrutinised the whole of the evidence given by the solicitor, including his explanation, as well as the evidence of the recording officer, we are more than satisfied that there were absent any grounds for impeachment. Sessions judges and magistrates should always bear in mind that the impeachment procedure is cumbersome and slow and should not be used unless the apparent discrepancy is material to the issue. See, *Muthusamy v. Public Prosecutor* [1948] MLJ 57.

The Sessions Court in the present case was clearly wrong in holding that the solicitor was a witness without credit especially in the light of the recording officer's admission of a possibility of confusion on that portion of the previous statement contended by the prosecution to amount to a material contradiction. We are therefore constrained to hold that the

solicitor's evidence did not lack credit and that the impeachment proceedings ought not to have been permitted in the circumstances of the present case.

For the foregoing reasons, we allowed the appeal. The appellant's conviction was quashed. The sentence imposed upon him was set aside. The fine, if paid, was ordered to be refunded.